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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 481

HUMBLE OIL & REFINING COMPANY, ET AL., *Petitioners*,

v.

SUN OIL COMPANY, *Respondent*

Petition For Writ of Certiorari to The United States Court of Appeals For The Fifth Circuit
and
Brief in Support Thereof

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No._____

HUMBLE OIL & REFINING COMPANY, ET AL., *Petitioners,*

v.

SUN OIL COMPANY, *Respondent*

PETITION FOR WRIT OF CERTIORARI

To the Honorable The Supreme Court of the United States:

Humble Oil & Refining Company, Mrs. Sarita K. East, and Mrs. Elena S. Kenedy pray that a writ of certiorari issue to review the judgment entered in this case by the United States Court of Appeals for the Fifth Circuit.

Opinions Below

The opinion of the Court of Appeals is reported at 190 F. 2d 191. The opinion of the Court of Appeals on Petition for Rehearing is reported at 191 F. 2d 705. The opinion of the District Court on the intervention of the State of Texas is reported at 88 FEDERAL SUPPLEMENT 658.

Summary Statement of Matter Involved

The Court of Appeals summarized the matter involved in the following language:

> "On February 24, 1949, this action was instituted in the court below by Sun Oil Company, a New Jersey corporation, against Humble Oil & Refining Company, a Texas corporation, and two individual defendants, both citizens of Texas. Federal jurisdiction was based solely on diversity of citizenship. The suit was to establish title to and recover possession of the oil-and-gas leasehold estate in 26 tracts of land in Kenedy County, Texas; to remove clouds from said title; and to enjoin the defendants from interfering with Sun's use of said property. Sun's claim was that the land in suit was submerged by the waters of Laguna Madre, which was an arm of the sea belonging to the State of Texas; and that said land was leased by the State to Sun.
>
> "The defendants disclaimed title to three of the tracts, on the ground that these three were below mean high tide; as to the remaining tracts, the defendants claimed title under three ancient grants from sovereigns prior to and predecessors of the Republic of Texas. One of these grants, Big Barreta, was issued by the King of Spain; the other, Los Mirasoles and Little Barreta, were from the Mexican State of Tamaulipas; each of these grants called for its eastern boundary to be Laguna Madre. The defendants conceded that the land in controversy was a part of the bed of Laguna Madre when their grants were issued, but claimed that its elevation had been increased so that, when this suit was filed, it was above mean high tide, and was joined to and part of the upland. * * *
>
> "It was admitted by plaintiffs below that the land in controversy, at the time of suit, was above sea level and above mean high tide, and that the waters of Laguna Madre encroached upon this land only when blown

there by the wind. If the common law were applicable, the call in each grant for Laguna Madre would make the line of mean high tide the eastern boundary of each grant; but, since the common law was adopted in Texas after the grants were issued, the boundary between the sea and the upland must be determined in accordance with the principles announced in Las Siete Partidas, the basic law of Spain and Mexico, which defines the shore of the sea as all the ground 'which is covered with the water of the latter at high tide during the whole year whether in winter or in summer.' The appellants contend that land not covered by the ebb and flow of the tide is not seashore but a part of the upland even though occasionally covered by wind-driven sea water. The appellees contend that land is seashore if it is covered at any time during the year with sea water; and the appellees agree that, regardless of the present situation, at the time of the issuance of these Spanish and Mexican grants to Mirasoles, Little Barreta, and Big Barreta, the Laguna Madre was then a continuous body of water running from Corpus Christi Pass on the north to the Brazos-Santiago Pass on the south, and connected with the Gulf of Mexico at both ends. In their amended answer, the defendants below (appellants here) alleged that the land in controversy was formerly covered by the waters of Laguna Madre, but now lies above the line of not only mean high-tide, but the highest tide in winter, and is accreted land, having accreted to and become a part of the aforesaid grants on which the Humble Oil Company holds valid mineral leases, which it acquired from the owners of said grants." (190 F. 2d 191, 193-194.)

The issue is whether flats which formerly were below sea level and now are above sea level and mean high tide belong to the owners of the adjoining upland or whether they are still a part of the sea. Petitioners own and possess the adjoining upland under grants which call for Laguna Madre

as the eastern boundary. Petitioners claim that said grants include all land above the present tide line and that the flats have built up above the reach of the tide by processes of accretion and reliction. Respondent claims that the flats are submerged land belonging to the State because they are covered at times by sea water blown by the wind from Laguna Madre.

The Conflict With The Balli Case

Attached to this petition is a copy of a contour map which was introduced in evidence (Defendants' Exhibit 20) showing the land in controversy, the upland portions of petitioners' grants, the present location of the bed of Laguna Madre (colored blue), and Padre Island. The elevations shown on this map were admitted by respondent to be correct (R. 361-364). The west boundary line of Padre Island follows the line established in STATE v. BALLI, 144 Tex. 195, (Cert. Den. 328 U.S. 852). The closely analogous BALLI case was a controversy between the State of Texas and various defendants, including respondent, over the title to and boundaries of Padre Island. The Texas Supreme Court held that the Mexican grant conveying Padre Island to respondent's predecessors extended to the line of mean high tide because Laguna Madre was called for as the *west boundary* of the island.

Petitioners say that the principle of Texas law upon which respondent and its co-defendants recovered title to thousands of acres of sand and mud flats in the BALLI case precludes recovery by respondent in the case at bar. This is true because whatever principle of law is applied to determine the boundary between a Mexican grant and the *east side* of Laguna Madre must also be applied to determine the boundary between a Mexican grant and the *west side* of Laguna Madre.

The Texas courts have applied one rule of law to delimit the eastern shore of Laguna Madre, and hopeless confusion will follow if the federal courts apply a different rule of law to delimit the western shore of the same narrow body of water.

The rule of Texas property law applied in the BALLI case is that a call for the sea as a boundary in a Spanish grant, as in a common law grant, extends the grant to the shore as determined by the ebb and flow of the tide, with the result that the boundary shifts with each change in the tide line. The Court of Appeals made no attempt to distinguish the BALLI case or to explain how, on identical facts, it could reach a result opposite to the result reached in the BALLI case on adjoining land. Petitioners say that the decision of the Court of Appeals in the present case cannot be reconciled with the decision of the Texas Supreme Court in the BALLI case and is in conflict with the Balli decision on an important question of Texas land law. The Balli decision is the latest pronouncement by the Texas Supreme Court on this subject.

The Conflict Between the Court's Holding on the Controlling Question and its Decision of the Case

The Court of Appeals held that, since petitioners' grants were issued by Spanish and Mexican governments, the definition of "seashore" contained in *Las Siete Partidas* must control in determining whether the land in suit is "seashore" (190 F. 2d 194). In the trial court and in the Court of Appeals the outcome of this controversy hinged upon the interpretation of this definition, which restricts the shore of the sea to ground "which is covered with the water of the latter at high tide during the whole year, whether in

winter or in summer". Respondent's sole claim to title rested upon its contention that the quoted definition included all land within reach of wind-driven water. If respondent's contention were sustained, then all of the land in suit except parts of Tracts 302, 310 and 311 would be "seashore" because, with these exceptions, it is all covered at times with wind-driven water. On the other hand, petitioners contended that the tide, and not the action of the wind, was controlling, and that, since the land in suit is not affected by the ebb and flow of the tide, it could not be "seashore" under the Spanish law definition. If petitioners' contention were sustained, then the land in suit must be included within petitioners' grants because each of these grants is bounded by the shore of the sea.

The Court of Appeals rejected respondent's contention and accepted petitioners' contention that "seashore" under Spanish law, as at common law, is marked by the ebb and flow of the tide and not by wind-driven water. The Court of Appeals said:

> "There would be no certainty as to the upland boundary of the shore if we took into consideration points to which sea water is driven by the wind. There are vestiges of hurricane floods for fifty miles or more inland from Beaumont to Brownsville; and the shore of Texas would be cut into fantastic shapes by these overflows if wind-driven waters extended its upland boundary in low places, while the high ground on each side showed no evidence of such overflows. The tide is another matter; there is nothing erratic about it. The tide is the rising and falling of the water of the sea that is produced by the attraction of the sun and moon, uninfluenced by special winds, seasons, or other circumstances. Hale, DeJure Maris, Chapter 6; Scott v. Doughty, 124 Va. 358, 97 S.E. 802; Embry's Waters of the State, p. 256. The tide delimits the shore, and it is no respecter of the conflict of laws." (190 F. 2d 195.)

The quoted holding undoubtedly is correct and follows the Texas law. Petitioners say that the decision conflicts with this holding because respondent could not recover on *any theory* unless the land in suit was submerged land at the time of the trial, and the holding precludes the possibility that the land in suit could have been submerged at that time.

The Burden of Proof

Having held that the land in suit is not seashore and, therefore, not submerged land, the Court of Appeals nevertheless affirmed the judgment of the District Court in favor of respondent. The court reached that result from the following conclusions: (1) The burden was on petitioners to prove that the land had accreted to petitioners' grants, (2) petitioners failed to meet that burden, or, in the alternative, (3) the trial court's finding that there has been no substantial building up since the original surveys is not clearly erroneous (190 F. 2d 199).

Petitioners say that it is fundamental that respondent (plaintiff in the trial court) could recover only upon the strength of its own title and not upon the weakness of petitioners' title. Whether this action be regarded as legal or equitable, the holding that the land in controversy is not seashore destroyed respondent's only claim and prevented any recovery by respondent on the strength of its own title. Respondent's title having failed, respondent could not recover even if petitioners had not proved accretion and the findings of the trial court had been correct in every respect.

In the opinion on rehearing the Court of Appeals conceded that respondent could recover only upon the strength of its own title. But the court held that respondent discharged its burden of proof that the land *is* submerged when it proved that the land *was* submerged at the time of the issuance of petitioners' grants. The court said:

> "The burden of proof, therefore, on the issue of accretion was upon the defendants, the plaintiff having shown that, at the time of said grants, the controverted area was submerged land lying beneath the inland waters of the State. A fact, once shown to exist, is presumed to continue until the contrary is proved." (191 F. 2d 715.)

Petitioners say that the contrary was proven beyond any controversy, as shown by the following statement in the first opinion:

> "It was admitted by plaintiffs below that the land in controversy, at the time of the suit, was above sea level and above mean high tide, and that the waters of Laguna Madre encroached upon this land only when blown there by the wind." (190 F. 2d 194.)

The contrary was established by respondent's own witness before respondent rested its case in chief (R. 361-364). Petitioners say, also, that the contrary was proven by the undisputed evidence that the land is no longer submerged (R. 1127-1129), by the undisputed evidence that the land has built up above sea level since the grants were issued (R. 1295, 1333-1335), and by the judicial admissions of respondent (R. 1367, 1386-1387).

In the opinion on rehearing the Court of Appeals said also: "The area in controversy was formerly the bed of the sea." (191 F. 2d 716.) At the time of the trial the land in suit admittedly was above the reach of the tide (190 F. 2d 194). The Court of Appeals held that "The tide delimits the shore, and it is no respecter of the conflict of laws." (190 F. 2d 195.) Petitioners say that these holdings demonstrate that the evidence rebutted the presumption upon which the decision rests.

The Trial Court's Finding on Accretion

The Court of Appeals held that the crucial question was whether the land in suit had accreted to petitioners' grants, that the evidence was undisputed, and that "if contrary reasonable inferences may fairly be drawn from the undisputed evidence, then the lower court's finding as to alleged accretions is against appellants; and we cannot say that it is clearly erroneous, the finding being that there has not been any substantial change or building up of the area since the original surveys." (190 F. 2d 199.) The Court of Appeals held that its decision must rest upon this finding (191 F. 2d 716).

Petitioners say that this holding violates the rule that where the facts are not in dispute findings by the trial court are not binding upon the appellate court, which will apply the law of the case to the undisputed facts. Petitioners say that the finding in question has no more effect than a conclusion of law by the trial court. Petitioners say also that the finding is clearly erroneous because it is contrary to the undisputed evidence showing that since the date of the grants the land in suit has built up from below sea level to its present elevation by deposition of sand and clay. All of the evidence on this subject was introduced by petitioners and respondents made no effort to controvert it. All of the evidence introduced shows that there has been a building up; no evidence was introduced to show that there has not been a building up.

The Court of Appeals stressed the Coast & Geodetic Survey maps as supporting the trial court's findings. The Court of Appeals said:

> "In practically all of the maps prepared by the United States Geodetic Survey, maps on file in the Texas Land

> Office, and many others in evidence, Padre Island is shown as a long strip of land, colored in the same color as the mainland; *in between, colored in blue, indicating water and connected with the sea at both ends, is an area called Laguna Madre, in which the land in controversy,* as well as the land upon which Humble obtained leases from the State of Texas, *is located.*" * (190 F. 2d 196.)

Plaintiff's Exhibit 84, Coast & Geodetic Survey's Coast Chart No. 1287, is the official map referred to in the opinion. For comparison, we submit herewith, under separate cover, a copy of the latest U. S. Coast & Geodetic Survey map, just off the press, and available only as uncolored "Advance Sheets." These Advance Sheets have been assembled into one map and have been colored according to the official color legend used by the U. S. Coast & Geodetic Survey on all coast charts. (Nautical Chart Manual of U.S.C. & G.S.) This new coast chart, to be printed in 1952, is based on work done in 1949 and 1950. It will be colored like the map submitted, with buff and green colors denoting land features, and the blue color denoting water. This map was not available at the trial or for submission to the Court of Appeals. Petitioners ask this Court to take judicial notice of the new map as the latest official map of the area prepared by the proper department of the Government. KNIGHT v. UNITED LAND ASSOCIATION, 142 U. S. 161, 168.

The new map shows that the land in controversy is no longer in the bed of Laguna Madre, but consisted of sand and mud flats rising above the ebb and flow of the tide in 1950. Coast Chart 1287, referred to in the opinion, is based on a survey made in 1879-1881. Compared with Coast Chart

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NOTE * Emphasis supplied throughout, unless otherwise indicated.

1287, the new map shows that the waters of Laguna Madre have abandoned the land in suit. The new map corroborates the undisputed testimony of Dr. Fisk (R. 1285-1335), which was disregarded by the Court of Appeals. Petitioners say that if the official maps are to have any weight in deciding whether the land *is* submerged, then the most recent map should be considered.

Accretion was Judicially Admitted by Respondent

At the conclusion of the testimony petitioners insisted that all disputed issues of fact should be submitted to the jury. In order to avoid submission of the case to the jury, respondent judicially admitted the fact that the land in suit had been built up from below sea level to its present elevation since the issuance of petitioners' grants (R. 1367, 1386-1387). The case was submitted to the trial court on questions of law presented by undisputed evidence, stipulations and judicial admissions. Three months later the District Judge announced his decision in favor of respondent and the State of Texas, intervenor, and filed voluminous findings of fact. One of these findings was "* * * there has not been any substantial change or building up of the area since the original surveys * * * *" (R. 1842.) When petitioners protested that this finding was contrary to respondent's admissions, the District Judge conceded that respondent had admitted the facts in question, but said that the State had not joined in that admission (R. 1891). The Court of Appeals held that the District Court erred in allowing the State to intervene because diversity of citizenship was thereby destroyed (190 F. 2d 197-198). The Court of Appeals reversed the judgment in so far as the State was concerned, and dismissed the State without prejudice (190 F. 2d 199). Although the State is not and could not be a

party to the suit, the Court of Appeals refused to give any effect to respondent's judicial admissions, on the ground that the State did not join in them. The Court of Appeals said:

> "Although the State's petition to intervene has been denied in this court, we think, in justice to it as an absent party, the admission of Sun's attorney on a mixed question of law and fact, should not be given retroactive effect." (191 F. 2d 714.)

Petitioners say that (1) respondent's admission was on a question of *fact* made for the purpose and with the effect of taking the case from the jury and should, therefore, be enforced, (2) failure of "an absent party" to join in an admission should not invalidate the admission in so far as the actual parties to the suit are concerned, (3) if the State was an indispensable party to the admission, then it is an indispensable party to the suit and the Federal Court could never acquire jurisdiction over the suit, and (4) the State in fact joined respondent in the admissions (R. 1367, 1386-1388).

Petitioners Were Deprived of a Trial by Jury

Because of respondent's admissions, petitioners did not request a jury finding on accretion. Petitioners did request submission of certain other issues to the jury, and further admissions by respondent made fact findings on those issues unnecessary (R. 1824-1825, 1393-1395). All parties had moved for instructed verdict (R. 1816, 1823), but the District Judge did not instruct a verdict. On the ground that the facts were undisputed, he discharged the jury and accepted submission of the case upon questions of law. No question of fact was submitted to the District Judge.

Petitioners say that an admission which is effective to take

a case from the jury should be sufficient to render clearly erroneous a finding by the trial court which conflicts with the admission. If the trial court can take a case from the jury on the ground that all facts are undisputed and then bolster its judgment by findings contrary to the undisputed evidence and the judicial admissions, the constitutional right to jury trial is meaningless. Petitioners say that they have in fact been deprived of a jury trial by the holding of the Court of Appeals.

The Court of Appeals held that the action was in equity and that petitioners were not entitled to a jury trial (190 F. 2d 197). Petitioners say that under Texas law the suit was in trespass to try title, an action at law, in which petitioners were entitled to a jury trial as a matter of right. Petitioners say that the holding conflicts with the applicable local decisions and the decisions of this Court upon an important question of local law, and that this suit is not, and could not be, an equitable proceeding, for the following reasons: (1) Respondent sued to recover title to and possession of land (R. 76), which makes the action one at law under local law, (2) trespass to try title affords an adequate legal remedy and would give respondent any relief to which it would be entitled in an equitable proceeding; (3) respondent did not allege the existence of any instrument of record which could serve as the predicate for an equitable proceeding to remove cloud, and (4) under the principles established at the time of the passage of the Judiciary Act of 1789, equity jurisdiction would not lie because (a) respondent has not established a legal title in a successful action at law, and (b) respondent was not in possession, and ejectment was available because, as a matter of law, petitioners' possession of the upland is also possession of all land formed on the shore by accretion or reliction.

Accretions to Padre Island

The Court of Appeals held that "Most of the land in controversy is on the Padre Island side of the old channel; as to this land, which prior to the construction of said canal was built up by sedimentation across the channel from the mainland appellants claim that it should be considered alluvion added to the shore of the mainland by accretion, but we cannot adopt this view." (190 F. 2d 196.)

The petition for rehearing pointed out that although respondent owns an oil and gas lease on Padre Island, it disclaimed in this suit any land in controversy which has accreted to Padre Island and, therefore, could not recover as to land "built up by sedimentation across the channel." Thereupon the Court of Appeals simply withdrew the above quoted statement, saying that "there is no issue in this case as to any land created by accretion to or reliction from Padre Island." (F. 190 F. 2d 716.) Petitioners say that it is undisputed that a substantial part of the land in suit has accreted to Padre Island and that the Court of Appeals erred in affirming the judgment as to such land after it had been disclaimed by respondent. Petitioners do not claim that this land has been added to their grants by accretion; it built up on the Padre Island side of Laguna Madre and therefore has become a part of Padre Island, which petitioners do not own. Petitioners say that the Court of Appeals committed fundamental error in holding that respondent can recover as to land expressly disclaimed by it.

Jurisdiction

The jurisdiction of this Court is invoked under the JUDICIAL CODE (28 U.S.C. 1254 and 2101 (c). The Court of Appeals denied petition for rehearing on September 20, 1951.

Questions Presented

1.

Did the Court of Appeals follow and apply the Texas law in holding that grants bounded on the East by Laguna Madre do not extend to the shore of Laguna Madre as determined by the ebb and flow of the tide?

2.

Did the Court of Appeals follow and apply the Texas law in holding that land formerly in the bed of the sea and now built up above the reach of the tide belongs to the bed of the sea and not to the owner of the adjoining upland, whose grants are bounded by the sea?

3.

Does the holding of the Court of Appeals that respondent should recover because petitioners failed to prove accretion to petitioners' grants violate the fundamental rule that a plaintiff can recover only upon the strength of his own title and not upon the weakness of defendant's title?

4.

Is respondent bound by judicial admissions which it made for the purpose and with the effect of taking the case from the jury?

5.

Did the Court of Appeals follow and apply the Texas law in holding that this action is an equitable proceeding in which petitioners were not entitled to a jury trial as a matter of right?

6.

Should findings of fact be given controlling effect when the record shows that they are contrary to undisputed facts and were made by the trial court after he discharged the jury and accepted submission of the case on questions of law because the facts were undisputed and no findings of fact were necessary?

7.

Did the Court of Appeals err in affirming the judgment for respondent as to land which respondent expressly disclaimed?

Reasons for Allowance of the Writ

1.

The holding that petitioners' grants do not extend to the shore as marked by the ebb and flow of the tide is in conflict with STATE v. BALLI, 144 Texas 195, (Cert. den. 328 U.S. 852). In the BALLI case the Supreme Court of Texas held that a Mexican grant calling for Laguna Madre as the west boundary includes the mud flats lying above mean high tide, although these flats were in the bed of the sea when the grant was made, because "seashore" is restricted by Las Siete Partidas to land lying below mean high tide. Although petitioners' three grants call for Laguna Madre as the east boundary and must be construed according to Las Siete Partidas as interpreted by the Texas courts, the Court of Appeals has held that these grants do not include sand and mud flats lying above mean high tide but are restricted to land which was upland when the grants were issued more than one hundred years ago.

The method of determining boundaries between the sea and privately owned land is of vast importance to every land

owner on the Texas coast, including the State. The Texas courts have settled this question, but if the Federal courts can disregard the Texas decisions, then wherever diversity of citizenship appears, the title to the huge areas of flats along the Texas coast is in doubt. If the decision of the Court of Appeals is sustained, the method of determining boundaries on the coast of Texas will depend upon whether diversity of citizenship exists.

2.

The holding that land formerly in the bed of the sea and now built up above the reach of the tide belongs to the bed of the sea and not to the owner of the adjoining upland is in conflict with STATE v. BALLI, 144 Texas 195, MANRY v. ROBISON, 122 Texas 213, and STATE v. TEXAS LAND AND CATTLE CO. (TCA), 78 S.W. 957, on an important question of local law.

3.

The holding that respondent is entitled to recover on the ground that petitioners failed to prove that the land in suit accreted to their grants is contrary to the fundamental rule of federal law and of local law that a plaintiff can recover only upon the strength of his own title and not upon the weakness of defendant's title. This holding conflicts with the decisions of this court in SHAPLEIGH v. MIER, 299 U.S. 468, 475, DICK v. FORAKER, 155 U.S. 404, 414, and FROST v. SPITLEY, 121 U.S. 552, 557, with the decisions of the Court of Appeals for the Fifth Circuit in GILCREASE OIL CO. v. COSBY, 132 F. 2d 790, 793, and GUARANTEE TRUST & SAFE DEPOSIT CO. v. DELTA & PINE LAND CO., 104 F. 5, 8, and with an unbroken line of decisions of the Texas Supreme Court from DALBY v. BOOTH, 16 Texas 564, 566, to BAUMGARTEN v. FROST, 143 Texas 533, 542.

4.

The holding that respondent discharged its burden to prove its title, i.e. to prove that the land *is* submerged, by proving that the land *was* submerged a century ago, based upon a theory that a fact once shown to exist is presumed to continue, is contrary to the holding and admission that the land in suit is now above the reach of the tide (190 F. 2d 194) and the holding that "The tide delimits the shore and it is no respecter of the conflict of laws." (190 F. 2d 195.)

5.

The holding that respondent is not bound by its judicial admissions, made for the purpose and with the effect of taking the case from the jury, conflicts with the decisions of this court in OSCANYAN v. ARMS CO., 103 U.S. 261, 263, and MUMMA v. POTOMAC CO., 8 Pet. 281, 285. The holding that the trial court was not bound by the stipulated facts but was free to make contrary findings of fact, after discharging the jury on the ground that no findings of fact were necessary, conflicts with the decisions of this court in HACKFELD v. U. S., 197 U.S. 442, 446-447, and MUMMA v. POTOMAC CO., 8 Pet. 281, 285-286.

6.

In giving controlling effect to the trial court's findings of fact, the Court of Appeals has so far sanctioned the departure by the trial court from the accepted and usual course of judicial proceedings as to call for an exercise of this court's jurisdiction. The record plainly demonstrates that no question of fact was submitted to the trial court for his determination. The trial court accepted submission of the case upon questions of law after he discharged the jury

because there was no dispute as to the facts and, therefore, no need for findings of fact. Nevertheless, the trial court found that there had been no substantial building up of the land in controversy. This finding was contrary to the undisputed testimony and to respondent's judicial admissions, which had been made for the purpose and with the effect of taking the case from the jury by eliminating all possible issues of fact. Respondent's admissions and the statements made by the trial court from the bench led petitioners to believe that the fact of accretion, as pleaded and proved by petitioners, was accepted by the trial court and by respondent as an undisputed fact which did not require a jury finding to support it.

7.

The holding that the Court of Appeals is bound by the trial court's findings upon evidence which the Court of Appeals held to be undisputed is in conflict with the decisions of this Court on an important question of federal law. The rule established by the decisions of this Court is that, where the evidence is undisputed, findings of the trial court are not binding upon the appellate court, which will apply the law of the case to the undisputed facts. NELSON v. MONTGOMERY WARD & Co., 312 U.S. 373. It is well settled also that a finding which is contrary to the undisputed evidence is clearly erroneous. U. S. v. YELLOW CAB Co., 338 U.S. 338, 342.

8.

The holding that trespass to try title did not afford an adequate remedy at law and that the action was an equitable one in which petitioners were not entitled to a jury trial, conflicts with applicable local decisions on an important question of local law. It is settled Texas law that the statutory action of trespass to try title (Article 7364, REVISED

CIVIL STATUTES OF TEXAS), is a legal remedy broad enough to embrace all character of litigation affecting title to land, and affords a completely adequate legal remedy. THOMPSON v. LOCKE, 66 Texas 383, 388, HARDY v. BEATY, 84 Texas 562, 568. It is well settled, also, that any suit in Texas wherein plaintiff seeks to recover title to and possession of land is in trespass to try title. DAY LAND AND CATTLE CO. v. STATE, 68 TEXAS 526, 535. Respondent sued to recover title to and possession of the land in controversy (R. 76).

If this action had been tried in a State court, it undoubtedly would have been an action in trespass to try title, a suit at law, in which petitioners would have been guaranteed a trial by jury as a matter of right by the Constitutions of the United States and Texas. The sole basis for Federal jurisdiction is diversity of citizenship. If the decision of the Court of Appeals is allowed to stand, the right to a trial by jury in suits involving Texas land will depend upon whether diversity of citizenship exists.

Conclusion

WHEREFORE, petitioners pray that this Court issue a writ of certiorari, directed to the United States Court of Appeals for the Fifth Circuit, and that the judgment of the Court of Appeals and the judgment of the District Court be reversed by this Honorable Court.

HUMBLE OIL & REFINING COMPANY,
MRS. SARITA K. EAST,
MRS. ELENA S. KENEDY,
Petitioners

By GORDON BOONE,
ALLEN V. DAVIS,
JACOB S. FLOYD,
ROBERT H. KELLEY,
R. E. SEAGLER,
REX G. BAKER,
K. C. MINTER,
CHARLES E. SHAVER,

NELSON JONES,
Counsel for Petitioners

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions of the Courts Below

The District Court did not write an opinion on the merits; its opinion on the intervention of the State of Texas is reported at 88 Federal Supplement 658. The opinion of the Court of Appeals is reported at 190 F. 2d 191. Its opinion on rehearing is reported at 191 F. 2d 705.

Jurisdiction

The judgment complained of was entered by the Court of Appeals for the Fifth Circuit on June 20, 1951, and petition for rehearing was overruled by that Court on September 20, 1951. The jurisdiction of this Court is invoked under the JUDICIAL CODE (28 U.S.C. 1254 and 2101 (c)).

Statement of the Case and Questions Presented

For a statement of the case and the questions presented, see the foregoing Petition (p. 2, et seq.).

Specification of Errors

1. The Court of Appeals erred in holding, contrary to the Texas decisions, that petitioners' grants do not extend to the shore of Laguna Madre as determined by the ebb and flow of the tide.

2. The Court of Appeals erred in holding, contrary to the Texas decisions, that land formerly submerged and now built up above the reach of the tide belongs to the bed of

the sea and not to the owner of the adjoining upland, whose grants are bounded by the sea.

3. The Court of Appeals erred in holding contrary to the applicable federal and local decisions, that respondent (plaintiff) was entitled to judgment because petitioners (defendants) failed to establish their title, even though respondent had failed to establish title in itself.

4. The Court of Appeals erred in holding that respondent is not bound by judicial admissions made by it for the purpose and with the effect of taking the case from the jury.

5. The Court of Appeals erred in holding, contrary to the Texas decisions, that this suit is an equitable proceeding and not a suit in trespass to try title.

6. The Court of Appeals erred in giving controlling effect to findings af fact which are contrary to the undisputed facts, contrary to judicial admissions, and were made by the trial court after discharging the jury because the facts were undisputed and no findings were necessary.

7. The Court of Appeals erred in holding that respondent was entitled to judgment as to land expressly disclaimed by respondent.

8. The Court of Appeals erred in affirming the judgment of the District Court.

Argument

The decision that petitioners' grants do not extend to the shore of Laguna Madre as determined by the ebb and flow of the tide conflicts with the applicable local decisions.

The attached contour map (Defendants' Exhibit 20) shows the tracts in controversy colored orange. The most northerly tracts—273*, 280 and 281—are claimed by petitioners under the grants called Mirasoles and Little Barreta. Each of these grants was issued by the Mexican State of Tamaulipas before Texas independence. The Court of Appeals recognized that "each of these grants called for its eastern boundary to be Laguna Madre". (190 F. 2d 193.)

Petitioners' title to these grants is unquestioned; the Kenedy family and their predecessors in title have owned them for more than a century. Also it is uncontroverted that Mirasoles includes the areas shown on the map as Potrero de las Canales and the northern part of Potrero Farias. In 1879 the State of Texas issued a confirmatory patent on Mirasoles which expressly includes those Potreros (R. 1486-E). Nor is there any question that Little Barreta includes Potrero Lopena and the mounds lying west of it, colored green on the attached contour map, as well as the southern part of Farias. Respondent stipulated that the areas named were included in the original grant to Little Barreta (R. 1393-1394).

Since petitioners own Canales, Farias and Lopena under Mexican grants which call for Laguna Madre as the eastern boundary, Tracts 273, 280 and 281 undoubtedly are included in petitioners' grants because they lie between Canales Farias and Lopena and the shore of Laguna Madre. This is true regardless of whether these tracts have accreted to petitioners' grants. It is true because the call for a natural object—Laguna Madre—cannot be given effect unless these tracts are included in petitioners' grants. The decision of

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* Petitioners disclaimed the part of 273 which is below mean high tide (R. 94). When we refer herein to 273 we mean that part of 273 which was not so disclaimed.

the Court of Appeals violates the cardinal principle of Texas boundary law that a call in a grant for a body of water as a boundary must be given controlling effect in locating the grant. STATE v. BALLI, 144 Texas 195, 251, STOVER v. GILBERT, 112 Texas 429, 436, GALVESTON COUNTY v. TANKERSLEY, 39 Texas 652, 660, PRITCHARD v. BURNSIDE, 140 Texas 212, 219. In OKLAHOMA v. TEXAS, 268 U.S. 252, 255, this Court said:

> "We think it apparent that the survey was intended to call, and did call, for the river as a boundary, and that controlling influence must be given to that call rather than to the course and distance given for that boundary. The courts of Texas, in common with other courts, recognize and apply this rule of interpretation."

It is settled Texas law that the boundary between Laguna Madre and petitioners' grants must be determined by the ebb and flow of the tide. This was the rule laid down in the BALLI case (supra) and recognized as the Texas law by the Court of Appeals when it said:

> "There would be no certainty as to the upland boundary of the shore if we took into consideration points to which sea water is driven by the wind * * * The tide is another matter; there is nothing erratic about it. The tide is the rising and falling of the water of the sea that is produced by the attraction of the sun and moon, uninfluenced by special winds, seasons or other circumstances * * * *The tide delimits the shore and it is no respecter of the conflict of laws* * * * Shore is sometimes said to be synonymous with 'flats' * * *; but *flats are not shore unless the tide ebbs and flows over them* * * * " (190 F. 2d 195.)

The tide does not ebb and flow over Tracts 273, 280 and 281; it is undisputed that the tide is confined within the

zero contour on Defendants' Exhibit 20, running along the eastern boundary of these three tracts. The Court of Appeals said that "It was admitted by plaintiffs below that the land in controversy, at the time of the suit, was above sea level and above mean high tide, and that the waters of Laguna Madre encroached upon this land *only when blown there by the wind.*" (190 F. 2d 194.)

Thus the Texas law requires that (1) Mirasoles and Little Barreta extend to the body of water called for in the grants, and (2) the boundary between the grants and Laguna Madre be determined by the ebb and flow of the tide. To give effect to these rules of Texas law, Tracts 273, 280 and 281 must be included in petitioners' grants. These tracts are not part of Laguna Madre because they are not affected by the tide; they are part of petitioners' grants because they lie west of the natural object which forms the eastern boundary.

The decision of the Court of Appeals is hopelesly in conflict with the decision of the Texas Supreme Court in the BALLI case (supra). The Texas court held in the BALLI case that, as a matter of law, the line of mean high tide is the west boundary line of a Mexican grant calling for Laguna Madre as its west boundary. The principle of law announced by the Texas court in the BALLI case presents an absolute bar to recovery by respondent in the present case. The same principle of law used to determine the boundary between a Mexican grant and the east side of Laguna Madre must also be used to determine the boundary between a Mexican grant and the west side of Laguna Madre. The Texas courts have adopted a rule of law which defines the *eastern* shore of Laguna Madre, and only injustice and confusion can follow if the Federal courts apply a different rule of law in defining the *western* shore of this narrow body of water.

If the decision of the Court of Appeals is affirmed this case will become the first instance in the history of Texas

where a boundary between the upland and a tidal body of water has been held *not* to follow the tide line. No Texas court or officer has ever determined a boundary of a Mexican grant on a theory compatible with the decision of the Court of Appeals.

The laws of Texas impose upon the Commissioner of the General Land Office the duty to establish the boundaries of all State land, including the boundaries between tidal bodies of water owned by the State, and privately owned upland. (Article 5251, REVISED CIVIL STATUTES OF TEXAS)* The Commissioner of the General Land Office, called as a witness by respondent, testified that for forty years it has been the consistent policy of the State of Texas to claim mean high tide as the boundary between tidal bodies of water and Mexican or Spanish grants (R. 1004). The Commissioner testified to numerous specific instances where the Land Office, pursuant to its statutory duty, established the boundary on the ground between state owned submerged land and privately owned Spanish or Mexican grants at the line of mean high tide (R. 1005-1013).

Unless the decision of the Court of Appeals is reversed, the Federal courts will have established a method of determining boundaries in Texas which is contrary to the local decisions and to the long established policy of the State. This means that the rights of property owners on the Texas coast will depend upon whether diversity of citizenship exists between adverse claimants. It was to avoid just such a result that this Court laid down the rule in ERIE R. CO. v. TOMPKINS, 304 U.S. 64, which requires the Federal courts to follow state decisions on matters of local law. It was to avoid "needless conflicts with state policy" that this Court held in ALABAMA PUBLIC SERVICE COMMISSION v. SOUTH-

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*See Appendix, p. 50.

ERN RAILWAY CO., 341 U.S. 341, that the Federal courts should withhold relief and relegate the parties to their remedies in state courts, rather than to determine or shape state policy.

According to Texas law, land formerly submerged and now above the reach of the tide is a part of an adjoining upland grant which is bounded by the sea.

Under the Little Barreta grant petitioners claim Tracts 295, 296, 297, the west 288 acres in 298, the west 97 acres in 299, and the north one-half of each of the following Tracts: 300, 301 and 302. These tracts are in a different situation from 273, 280 and 281 because here Laguna Madre has disappeared completely and the former bed of the sea now is entirely above mean high tide. (See Defendants' Exhibit 20 and the new Coast & Geodetic Survey map submitted herewith.)

The Court of Appeals held that all of the above described land was submerged in 1835 when Little Barreta was titled. The Court said:

> "The area in controversy was formerly the bed of the sea." (191 F. 2d 716.)

The Court said also:

> "The burden of proof, therefore, on the issue of accretion was upon the defendants, the *plaintiff having shown that, at the time of said grants, the controverted area was submerged land* lying beneath the inland waters of the State." (191 F. 2d 715.)

The Court of Appeals held that the above described land admittedly was above the reach of the tide at the time of the trial, 115 years after Little Barreta was titled (190 F. 2d 194). The Court held also that *"The tide delimits the shore, and it is no respecter of the conflict of laws."* (190 F. 2d 195.)

It is apparent that the above described land is not "seashore", as claimed by respondent, under the applicable local decisions (STATE v. BALLI, 144 Texas 195), or under the holding of the Court of Appeals. According to the undisputed evidence and the holding of the Court of Appeals, there is no longer any seashore, or submerged land, or bed of the sea between petitioners' grants and Padre Island from the north line of Tract 298 down to the south line of the most southerly Tract in controversy. Under Texas law when a body of water which separated two riparian Mexican grants recedes from its former bed, the soil left bare becomes the property of the riparian owners. In MANRY v. ROBISON, 122 Texas 213, 227, the Texas Supreme Court said:

> " * * * under the civil law, the State, as the successor in title to the Republic of Mexico to the land involved, *so long as the Brazos river occupied it, held the same under a title within the definition of a base or determinable fee,*—that is, its title, while an estate in fee, was in fact a base or qualified one, *determinable in favor of the riparians upon the abandonment of the bed by the river.*"

Lying above the reach of the tide today, the above described land could not be submerged land under Texas law. It is attached either to Little Barreta or to Padre Island, depending upon whether it is west or east of the last channel occupied by Laguna Madre. It is plain from the admittedly correct contours on Defendants' Exhibit 20 that

the last vestige of the Lagunal trough followed a line running from approximately the northeast corner of Tract 298 to the southwest corner of Tract 299. It is plain from the undisputed testimony of Dr. Fisk (R. 1334-1335) and from Defendants' Exhibit 73, which he introduced to show Laguna Madre as it existed about 1800 (R. 1334), that all of the above described land claimed by petitioners under Little Barreta is on the mainland side of Laguna Madre as it existed when Little Barretta was titled.

Big Barreta lies south of Little Barreta and was titled by the King of Spain in 1804. Petitioners' title to Big Barreta withstood attack by the State in STATE v. SPOHN, which resulted in a judgment decreeing that the eastern boundary of the grant is Laguna Madre (R. 1553-1557). Under Big Barreta petitioners claim the south one-half of Tracts 300, 301 and 302, Tracts 310, 311, 316, 317, 325 and all of Tract 312 except the southeast 81 acres. What has been said concerning land claimed under Little Barreta is applicable also to this land. It certainly is not submerged land under Texas law or under the definition of the Court of Appeals. Since it is not submerged, the judgment is erroneous because respondent's only claim has failed. This would be true even if petitioners had shown no title in themselves. However, under MANRY v. ROBISON, 122 Texas 213; STATE v. BALLI, 144 Texas 195; and STATE v. TEXAS LAND AND CATTLE CO., 78 S.W. 957, this land became attached to Big Barreta when it ceased to be affected by the tide, because the grant calls for Laguna Madre as the boundary.

While petition for rehearing was pending the Court of Appeals propounded certain questions to the parties by telegram. Petitioners' reply contained a copy of Defendants' Exhibit 20 on which was drawn a heavy black line representing the last vestige of the channel of Laguna Madre in the

area where it no longer exists. This line is supported by the undisputed evidence and by Defendants' Exhibits 20 and 73. For the sake of brevity, petitioners refer to that reply for a more detailed discussion.

A large part of the area in controversy lies east of the last channel; petitioners concede that such land is attached to Padre Island and not to petitioners' grants. Petitioners say that the Court of Appeals erred in affirming the judgment as to that land because (1) respondent's sole claim failed when the undisputed proof showed that the land is no longer submerged, and (2) respondent expressly disclaimed as to any land added to Padre Island by accretion or reliction (R. 161, 191 F. 2d 716).

The decision of the Court of Appeals conflicts with the rule that a plaintiff can recover only upon the strength of his own title.

Respondent's only claim to the land in suit is the contention that it is submerged land, a part of the seashore. If it was not proved to be seashore at the time of the trial, then respondent's title failed and respondent could not recover, regardless of any weakness in petitioners' title. Whether this suit is an action in trespass to try title or a bill to remove cloud from title, it is the rule that the plaintiff can recover only upon the strength of his own title and not upon the weakness of the defendants' title. SHAPLEIGH v. MIER, 299 U.S. 468, 475; DICK v. FORAKER, 155 U.S. 404, 414; FROST v. SPITLEY, 121 U.S. 552, 557; GILCREASE OIL CO. v. COSBY, 132 F. 2d 790, 793; GUARANTEE TRUST & SAFE DEPOSIT CO. v. DELTA & PINE LAND CO., 104 F. 5, 8; BAUMGARTEN v. FROST, 143 Texas 533, 542.

This fundamental rule was violated by the decision of the Court of Appeals. That court held correctly that the

land in suit admittedly is above the reach of the tide (190 F. 2d 194), and that the tide delimits the shore and land above its reach is not seashore, even though covered at times with wind driven sea water (190 F. 2d 195). These holdings destroyed respondents' sole claim. Nevertheless, the court affirmed the judgment on the single ground that petitioners failed to establish their defense of accretion or, in the alternative, that the trial court's finding against petitioners was not clearly erroneous (190 F. 2d 199). Thus the Court of Appeals held that defendants' failure to establish their title enabled plaintiff to recover, even though plaintiff's title had failed.

This error was pointed out in petition for rehearing. In the second opinion the Court of Appeals, conceding that respondent must prove the land in suit submerged in order to recover, held that respondent discharged this burden by proving that the land *was* submerged when petitioners' grants were issued. This is the sole basis for the decision on petition for rehearing. Said the Court: "A fact, once shown to exist, is presumed to continue." (191 F. 2d 715.) In so holding, the court disregarded the admitted fact, recited in the first opinion (190 F. 2d 194), that the land in suit is no longer affected by the tide. Likewise it disregarded the fact that respondent's surveyor witness testified, before respondent rested its case in chief, that the land in suit *is* above sea level and that the elevations shown on Defendants' Exhibit 20 *are* correct (R. 361-364). Furthermore, it ignored the trial court's finding that the tides do not *now* ebb and flow over this land (R. 1839). It disregarded also the judicial admissions of respondent (R. 1367, 1386-1387) and the undisputed evidence that the land is no longer submerged (R. 1127-1129).

The presumption upon which the Court of Appeals rested its second opinion was rebutted by admitted facts recited

in the first opinion. Petitioners submit that there is no escape from the proposition that respondent has been allowed to recover, in spite of complete failure of its own title, because of the supposed weakness of defendants' title.

The Court of Appeals erred in holding that respondent is not bound by its judicial admissions.

The evidence relied upon by both sides in the trial court was undisputed. Respondent relied upon undisputed evidence that on occasions most of the land in suit is covered with wind driven sea water. Petitioners relied upon undisputed evidence that the land in suit has, since the date of the grants, built up from below sea level to its present elevation above mean high tide. When the testimony was concluded, the trial court announced that he would submit all disputed issues of fact to the jury. The trial court inquired whether respondent disputed the fact, alleged and proved by petitioners, that this land had built up since the issuance of petitioners' grants. To avoid submission of the case to the jury, counsel for respondent in open court replied that respondent did not dispute that fact or the evidence introduced by petitioners to prove it (R. 1367).

Before the jury was discharged, the trial court repeated his inquiry to counsel for respondent, stating that he did so because the State had not made its position clear. Again, counsel for respondent assured the trial court that respondent did not dispute the fact or the evidence relied upon by petitioners. Respondent's counsel reasserted his admission that the land in controversy was accreted land and that petitioners were entitled to judgment as a matter of law unless his theory of the Spanish law was correct (R. 1386-1387).

When counsel for the State advised the court that " * * * We did not intend to make a fact issue on the fact that the

condition was the same as Mr. de la Fuente found it" (R. 1387), the trial court discharged the jury because there was no disputed issue of fact and no fact findings were necessary, according to the admissions of respondent and the State. In the appendix to this brief (pp. 48-50) we have included quotations from the record showing the colloquies between court and counsel which resulted in the discharge of the jury.

The statements of respondent's counsel, made in open court, constituted a judicial admission of a fact pleaded and proved by petitioners. OSCANYAN v. ARMS CO., 103 U.S. 261, 263; WIGMORE ON EVIDENCE (3d ed.), Sec. 1058. A fact so admitted is established conclusively and cannot thereafter be disputed. OSCANYAN v. ARMS CO. (supra); MUMMA v. POTOMAC CO., 8 Pet. 281, 285; WIGMORE ON EVIDENCE, Sections 2588, 2590. Respondent's admission made it unnecessary for petitioners to request or obtain a finding because the fact was established as a matter of law. HACKFELD v. U. S., 197 U.S. 442, 446-447; BUTE v. STICKNEY (TCA), 160 S.W. 2d 302, 305.

The Court of Appeals refused to give any effect to respondent's admission upon the ground that the State did not consent to the admission (191 F. 2d 713-714). In fact, the State did join respondent in this admission (R. 1386-1388) and the holding is erroneous for that reason. However, the holding would be erroneous even if the State had refused to join, because the Court of Appeals has dismissed the State from this action on the ground that its presence would destroy diversity jurisdiction. The Court of Appeals held correctly that the State is not a citizen and the Federal Courts could never acquire jurisdiction of its claim where jurisdiction depends solely upon diversity (190 F. 2d 197-198). Yet the Court of Appeals has held also that the State's

failure to join in an admission by respondent nullifies the admission. That holding could mean only that the State is an indispensable party to the suit. If so, the Federal Courts could never acquire jurisdiction over this controversy and the cause must be dismissed. POSTAL TELEGRAPH CABLE CO. v. STATE OF ALABAMA, 155 U.S. 482, 487; KENDRICK v. KENDRICK (5 Cir.), 16 F. 2d 744; JOHNSON v. RIVERLAND LEVEE DISTRICT (8 Cir.), 117 Fed. 2d 711, 714. If the holding that respondent is not bound by an admission unless joined therein by the State is correct, then the suit must be dismissed for want of jurisdiction. If this holding is not correct, then the admission of respondent certainly should be enforced, and this would require reversal of the decision of the Court of Appeals.

The statement in the opinion that "The court below disregarded it (the admission) as not having become effective" (191 F. 2d 714), is contrary to the record. The trial court gave effect to the admission when he discharged the jury on the ground that respondent did not controvert the fact relied upon by petitioners. The admission was made by respondent for the purpose and with the effect of avoiding submission of the case to the jury. It is equally clear that petitioners would have requested submission of this issue to the jury if they had not considered respondent's admission effective to dispense with any need for a finding of fact (R. 1394).

The Court of Appeals also stated that the admission was on a "mixed question of law and fact" (191 F. 2d 714), yet the Court of Appeals decided this case upon the sole ground that the question of accretion was one of fact, the burden of proving which was upon petitioners (190 F. 2d 199; 191 F. 2d 715). Since the question whether the land in suit has built up was purely a question of fact, respondent's admission that the land has built up was purely an

admission of fact. This case bears no resemblance to the cases cited by the Court of Appeals (e.g. SWIFT v. HOCKING VALLEY RY. CO., 243 U.S. 281) where parties attempted to agree upon the *law*. This case is one where parties agreed upon a *fact*, as shown by the holding of the Court of Appeals that the burden of proving this *fact* was upon petitioners.

The Court of Appeals erred in giving controlling effect to the trial court's findings on accretion.

Even if the holding that respondent was not bound by its judicial admissions had been correct, the Court of Appeals erred in giving controlling effect to findings which are contrary to the undisputed evidence. The Court of Appeals said: "In the last analyisis, our decision must rest upon these findings, as in our judgment they are not clearly erroneous." (191 F. 2d 716.) The findings upon which the Court of Appeals leaned so heavily were to the effect that there had not been any substantial change or building up since the original surveys (190 F. 2d 199). Petitioners submit that the opinions by the Court of Appeals in this case show that these findings are clearly erroneous.

The Court of Appeals held that respondent proved that "at the time of said grants, the controverted area was submerged land lying beneath the inland waters of the State." (191 F. 2d 715.) The Court of Appeals held that "The area in controversy was formerly the bed of the sea." (191 F. 2d 716.)

To determine whether the Court of Appeals found that the record shows that a substantial building up actually has occurred since the grants, compare the foregoing language with the following:

"It was admitted by plaintiffs below that the land in controversy, at the time of suit, was above sea level and above mean high tide, and that the waters of Laguna Madre encroached upon this land only when blown there by the wind." (190 F. 2d 194.)

"The area in controversy is above sea level, sloping according to the contour from one one-hundredth of a foot above sea level to three or four feet." (190 F. 2d 196.)

"*Most of the land in controversy is on the Padre Island side of the old channel;* as to *this land,* which prior to the construction of said canal *was built up by sedimentation* across the channel * * * " (190 F. 2d 196.)

"It is impossible to determine what has *accreted* to the islands and what to the mainland." (190 F. 2d 197.)

The Court of Appeals held that the evidence was undisputed. The Court said:

"The crucial question for determination is whether land, which admittedly was a part of the original bed of Laguna Madre and outside of appellants' mainland grants, has become a part of the mainland under the doctrine of accretion. The burden of proving this was on appellants; and we think, *upon the undisputed facts,* that they failed to meet this burden. If we are incorrect about this as a conclusion of law, and contrary reasonable inferences may fairly be drawn from the *undisputed evidence,* then the lower court's finding as to the alleged accretions is against appellants; and we cannot say that it is clearly erroneous, the finding being that there has not been any substantial change or building up of the area since the original surveys." (190 F. 2d 199.)

Hence, this is not a case where the trial court made findings of fact upon *conflicting* evidence. The holding that the Court of Appeals was bound by these "findings" conflicts with the decisions of this Court and with prior decisions of that court on an important question of federal law. Where the facts are not in dispute, findings by the trial court are not binding upon the appellate court, which will apply the law of the case to the undisputed facts. NELSON v. MONTGOMERY WARD & Co., 312 U.S. 373, U. S. v. SOUTH GEORGIA RY. Co. (5 Cir.), 107 F. 2d 3, STUBBS v. FULTON NAT. BANK OF ATLANTA (5 Cir.), 146 F. 2d 558. This rule applies to equity suits and to trials without a jury in actions at law. TEXAS AGR. ASS'N v. HIDALGO COUNTY W. C. & IMP. DIST. No. 1 (5 Cir.), 125 F. 2d 829, U. S. v. SOUTH GEORGIA RY Co. (Supra). According to these decisions, a finding by the trial court upon undisputed evidence is of no more effect than a conclusion of law by the trial court.

A finding of fact which is contrary to the undisputed evidence is "clearly erroneous" and must be disregarded. KUHN v. PRINCES LIDA OF THURN & TAXIS (3 Cir.), 119 F. 2d 704, 706, SEARS, ROEBUCK & Co. v. TALGE (8 Cir.), 140 F. 2d 395, 396. It is the duty of the appellate courts, including the Supreme Court, to correct clear error in findings of fact. U. S. v. YELLOW Co., 338 U.S. 338, 342.

If the Court of Appeals had applied the law of the case to the undisputed facts it could not have affirmed the judgment. All of the evidence on accretion and reliction was introduced by petititioners and respondent made no effort to controvert it. The only expert witness was Dr. H. N. Fisk, a geologist whose qualifications are unquestioned (R. 1286-1287). From July, 1947, to January, 1950, Dr. Fisk devoted most of his time to a study of the Laguna Madre flats (R. 1288); he spent months on the flats with a crew

of three geologists and twenty laborers (R. 1295-1296). The accepted method by which geologists determine whether accretion has occurred is the examination of samples obtained from borings (R. 1286-1287). Dr. Fisk examined samples from 3,500 borings made in the area in controversy (R. 1317). Also he studied aerial photographs, topographic maps and other data. The canal was dug across the land in suit during his investigation and Dr. Fisk examined the cut bank as the excavation progressed.

Based upon this intensive investigation, Dr. Fisk gave the following testimony:

(1) The land in controversy once was the bed of an ancient bay and for a long time it has been building up slowly, layer on layer, until today it is above sea level (R. 1295).

(2) This build-up resulted from deposition of wind-blown sand and water-borne clay (R. 1299). These natural processes are still at work, as they have been for hundreds of years. Sand washed up on the Gulf beach of Padre Island dries out there and is blown from Padre Island to the mainland by the prevailing Southeast wind (R. 1305-1306). Irregularities on the surface of the flats disturb the wind currents and cause the sand to drop; for example, a great pile of sand accumulated at an abandoned marsh buggy (R. 1306). The margin of the upland, rising several feet above the surface of the flats, provides the principal irregularity in the area and naturally receives the greatest accumulation of wind blown sand. The same thing is true with respect to water-borne clay; it accumulates at the base or margin of the higher ground against which the wind drives the water (R. 1313).

(3) About 1800 Laguna Madre was a continuous body of water, its bed below sea level, lying between appellants' grants and Padre Island (R. 1335; Defendants' Exhibit 73). The slow addition of layer on layer of wind-blown sand and water-borne clay has caused the flats to rise above sea level (R. 1299).

It is the law in Texas that where a subject is one for experts alone and concerns a matter of science of which a layman can have no knowledge, undisputed expert opinion evidence is conclusive and must be accepted and acted on as other undisputed evidence. COXSON v. ATLANTA LIFE INS. CO., 142 Texas 544, 548, SCOTT v. LIBERTY MUTUAL INS. CO. (TCA), 204 S.W. 2d 16, 18, TRAVELERS INS. CO. v. GLAZIER (TCA), 228 S.W. 2d 217, 220. The rule announced by the Texas courts on this point of local law must be applied by the federal courts in a diversity suit. STONER v. NEW YORK LIFE INS. CO., 311 U.S. 464. The decision of the Court of Appeals, which ignored the undisputed testimony of Dr. Fisk, conflicts with the applicable local decisions on an important question of local law.

Petitioners also introduced other evidence showing accretion and reliction. From the record in STATE v. TEXAS LAND & CATTLE CO., 78 S.W. 957, petitioners introduced the testimony of J. W. Fitch (R. 1362-1363), J. G. Kenedy (1773-1774) and J. B. Wells (1775), all long since deceased. The substance of their testimony, given in 1903, was that the mainland from Corpus Christi to Brownsville had been "extending into the Laguna Madre" year after year as the result of deposition of sand brought from Padre Island by wind and water. Mr. Fitch had been familiar with this condition since 1851, Mr. Kenedy since 1868, and Mr. Wells since 1878. The Texas court held that this testimony was sufficient to prove accretion of a very large area of sand

and mud flats to a Spanish grant, Los Laureles, lying a few miles north of petitioners' grants and calling for Laguna Madre as the eastern boundary (78 S.W. 960-961).

The ancient grants to Mirasoles (R. 1704, Little Barreta (R. 1752) and Padre Island (discussed in detail in 173 S.W. 2d 522), all surveyed by de la Fuente at about the same time, demonstrate conclusively that the condition of the land in suit was far different in the early part of the nineteenth century from the condition which prevailed in 1950. Likewise, the map of the Texas coast prepared by the Texas Navy in 1844 (Defendants' Exhibit 76, R. 1361-1362), shows the depth of the channel between petitioners' grants and Padre Island to be 1½ feet in places where the land was two or three feet above mean high tide in 1950.

To demonstrate the result which would have obtained had the Court of Appeals applied the law of the case to these undisputed facts, we quote from the first opinion:

> "If alluvion forms adjoining the seashore, the latter recedes with the tide; and, by the doctrine of accretion, any new alluvion that forms above the tide line becomes a part of the contiguous upland estate. State v. Balli, supra." (190 F. 2d 196.)

The holding that this suit is an equitable proceeding in which petitioners were not entitled to a jury as a matter of right conflicts with the applicable local decisions.

Article 7364, REVISED CIVIL STATUTES OF TEXAS (enacted in 1840) provides that:

> "All fictitious proceedings in the action of ejectment are abolished. The method of trying titles to lands, tenements or other real property shall be by action of trespass to try title."

The oil and gas leasehold estate in Texas is an interest in land. TEXAS CO. v. DAUGHERTY, 107 Texas 226. Trespass to try title is the proper action in Texas to determine a dispute as to ownership of oil and gas in place. YATES v. STATE (TCA), 3 S.W. 2d 114, 118. Respondent (plaintiff) sued to recover "the title to and possession of the leasehold estate in and under the above described tracts of land." (R. 76.) Unquestionably the action would have been regarded as a suit in trespass to try title in the Texas courts. Nor did the accident of diversity of citizenship transform it into an equitable proceeding. The holding of the Court of Appeals that the suit was an equitable action to remove cloud is directly in conflict with WHITEHEAD v. SHATTUCK, 138 U.S. 146, 151.

The Court of Appeals attempted to distinguish WHITEHEAD v. SHATTUCK on the ground that petitioners did not allege that they were in possession. The court said petitioners alleged "only that it was accreted land, above mean high tide, on which they had mineral leases" (191 F. 2d 709). This holding overlooks the fundamental rule that possession of the upland under a grant calling for a body of water as the boundary is likewise possession of accretions. Under the decision of the Texas court in GRAHAM v. KNIGHT (TCA), 240 S.W. 981, 984, petitioners' possession of the upland was possession also of all accretion and reliction attaching to those grants. Petitioners and their predecessors have been in possession of the upland for more than a century (R. 1695, 1696, 1697). Respondent was not in possession; it sought to obtain possession in this suit. Respondent did maintain a camp on Toro, where one employee stayed for a time, but respondent made no claim to possession of any part of the surface except that small area. Respondent made no claim to possession of the oil, gas and mineral leasehold estate

in any of the land in suit,* although that was the estate from which it sought to remove "cloud".

The Court of Appeals held that HOLLAND v. CHALLEN, 110 U.S. 15, is controlling on this point. However, HOLLAND v. CHALLEN is applicable only to a situation where defendant is not in possession and no adequate legal remedy exists. Here trespass to try title afforded an adequate legal remedy. In THOMPSON v. LOCKE, 66 Texas 383, 388, the Texas Supreme Court said:

> "The action of trespass to try title serves the purposes of an action of ejectment in this State; but in it the question of title, as well as the right to possession, is determined and as fully settled as it could be by a suit to quiet title; hence seldom, if ever, could a suit to quiet title, technically considered, be here necessary * * * "

Since respondent sued to recover the title to and possession of the oil and gas leasehold estate, this suit could be regarded only as a trespass to try title action under the Texas law. In HARDY v. BEATY, 84 TEXAS 562, 568, the Texas Supreme Court described the scope of Article 7364 as follows:

> "The remedy was evidently designedly intended as broad enough and effective in its scope to embrace all character of litigation that affected the title to real estate."

Respondent did not allege the existence of any instrument of record which could form the basis for an action to remove cloud. It is elementary that a suit is not one to re-

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*On the contrary, it alleged it "is now eager to commence drilling operations for the exploration and **discovery** of oil and gas." (R. 74.)

move cloud unless plaintiff alleges and proves the existence of a cloud upon title. DEVINE v. LOS ANGELES, 202 U.S. 313, 335, TRUSTEES OF SCHOOLS v. WILSON, 334 Ill. 347, 78 A. L. R. p. 40. These authorities hold that an assertion of ownership, written or oral, is not a "cloud on title" within equity jurisdiction.

In the case at bar the "cloud" alleged by respondent consisted of three letters written by petitioners to the School Land Board (R. 69-73). These letters asserted that the land in controversy is above mean high tide, has accreted to petitioners grants, and is claimed by petitioners. All three assertions are true and are undisputed by respondent.

The very fact that the "clouds" which respondent seeks to remove are mere letters demonstrates that the real purpose of the suit is not to remove cloud but to recover title and possession. What real relief would respondent obtain from a decree which went no further than to remove three letters from the files of the School Land Board?

The Court of Appeals recognized that the action of trespass to try title is an action at law in which the parties are entitled to a jury trial as a matter of right. In its second opinion, the Court laid down the following test for determining whether petitioners were entitled to a jury trial:

> "Whether or not the parties were entitled to a jury trial in this case as a matter of right depends upon whether the plaintiff had a plain, adequate, and complete remedy at common law to recover these leasehold estates as of the time of the adoption of the Judiciary Act on September 24, 1789, or the Seventh Amendment on December 15, 1791." (191 F. 2d 712-713.)

For the following reasons this action could not be an equitable proceeding when measured by the Court of Appeals' yard stick:

(1) Trespass to try title affords an adequate legal remedy. THOMPSON v. LOCKE, 66 TEXAS 383, 388, TANNILLE v. COPELAND (D. C. Tex.), 288 Fed. 860.

(2) At the time of the adoption of the Judiciary Act or the Seventh Amendment, a court of equity would not entertain a bill to remove cloud unless the complainant already had established a legal title by a successful action at law. STARK v. STARR, 6 Wall. 402; WEHRMANN v. CONKLIN, 155 U.S. 314. Modern statutes in many states permit the suit to be brought in equity, without prior establishment of title in ejectment. Only where such a remedial statute has been enacted can federal courts entertain jurisdiction without prior establishment of title by complainant. WOOD v. PHILLIPS (4 Cir.), 50 F. 2d 714, 716. These statutes do not affect the right to trial by jury, which must be determined in accordance with principles applied by the federal courts when the Judiciary Act of 1789 was adopted. WHITEHEAD v. SHATTUCK, 138 U.S. 146; HENRIETTA MILLS v. RUTHERFORD COUNTY, 281 U.S. 121. Texas did not enact a statute allowing bills to remove cloud to be maintained without prior establishment of legal title in ejectment. Instead Texas created trespass to try title, a *legal* remedy, which is broad enough to embrace all character of litigation affecting title to land. HARDY v. BEATY (supra). Under Texas law respondent could maintain a trespass to try title suit without prior establishment of title and could obtain in that suit all of the relief which could be granted by a court of equity; but the suit would be (as is the present suit) an action at *law*. There is no Texas statute which relieves respondent of the burden of prior establishment of title in an equity suit.

(3) A federal court of equity will not entertain a bill to remove cloud brought against a defendant in possession. WHITEHEAD v. SHATTUCK, 138 U.S. 146, 151.

The Court of Appeals erred in holding that respondent could recover as to land which it had expressly disclaimed.

Since respondent owns an oil and gas lease on Padre Island and its accretions, which it acquired from the owners of the Mexican grant involved in the Balli suit, petitioners requested an admission that respondent did not claim any of the land in suit as accretion to Padre Island. Respondent made this admission, disclaiming any accretion to Padre Island involved in this suit (R. 161. 191 F. 2d 716). The Court of Appeals held in the first opinion that most of the land in controversy had "built up by sedimentation" on the Padre Island side of Laguna Madre and, therefore, could not be accretion to petitioners' grants on the other side of Laguna Madre (190 F. 2d 196). On rehearing, petitioners pointed out that respondent could not recover as to land built up by sedimentation on the Padre Island side because it had expressly disclaimed such land. In the opinion on rehearing the Court of Appeals withdrew the statement contained in the first opinion and said that "there is no issue in this case as to any land created by accretion to or reliction from Padre Island" (190 F. 2d 716).

It is undisputed that the following tracts in controversy are on the Padre Island side of Laguna Madre, as it existed when the grants were made: 314, 327, 339, 340, 355, 356, 369, the East 369 acres of Tract 299, and the East 110 acres of Tract 298.

Petitioners do not claim that their grants include the above numbered tracts. Petitioners recognize that these tracts, lying east of the old channel of Laguna Madre, have

been added to Padre Island by accretion and reliction and, therefore, belong to the owners of Padre Island. Petitioners say that the decision of the Court of Appeals, which allowed respondent to recover as to this land in spite of its express disclaimer, is fundamentally erroneous. HERRING v. SWAIN, 84 Tex. 523; CONVERSE, EXECUTOR v. LANGSHAW, 81 Texas 275, 279; HATTEN v. VOSE (10 Cir.), 156 F. 2d 464, 469. As plaintiff, respondent was required to recover upon the strength of its own title, and it certainly cannot recover as to land which it has expressly disclaimed.

Conclusion

Petitioners therefore pray that this Court grant the writ of certiorari herein prayed for, and that this Court reverse the judgment of the Court of Appeals and that of the District Court.

Respectfully submitted,

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APPENDIX

"THE COURT: Of course if you are correct on that, then the question of accretion certainly does not apply to any land that is covered by any water of the sea during the year.

MR. WINN: That is right. That settles the law suit.

MR. JONES: That—excuse me.

THE COURT: But my point is this: I want, while this jury is here, in order that the matter may be fully threshed out, if there be any fact issues, and if you should be wrong about the law and I should agree with you later, I want them to have those findings of fact as a part of the record, whatever they may be, and the issues of accretion and on the issues of—

MR. WINN: Your Honor please, either the Plaintiffs or the Defendants are entitled to a judgment as a matter of law in this case under the record as it now stands.

THE COURT: I am beginning to believe you are right about that.

MR. WINN That is exactly right. Suppose we suggest—

THE COURT: I don't know whether the State will agree or not.

MR. RICE: I don't quite agree with that.

MR. WINN: Suppose you should ask the Jury whether or not the water of the sea goes over this land. There is no dispute about that. Suppose you should ask them if the elevation is above sea level, as has been testified here. No dispute about it. Suppose you should ask them if there has been, as theoretically suggested by Dr. Fisk here, a build-up through a period of years? No dispute about it. We were not bothered about that. The water still rolls over it.

THE COURT: If you are right on the law, that it doesn't make any difference about this theory of accretion, because the water still rolls over it.

MR. WINN: Right. If I am not right, this land is accreted land and the Defendant is entitled to a judgment, as a matter of law. That is exactly where this case stands. That is where we stood when it started, and that is where it stands now." (Rep. Or. Tr. 1724-1726; Sun's Reply 17, 19; R. 1367.)

"MR. JONES: Now, your Honor, it is simply our position that we do not want to be told by an Appellate Court at some future date, whether we are appellants or appellees, that we waived a right to have established the fact question, if one exists, as to the location of Laguna Madre and as to the location of the northeast corner of the Little Barreta. You can see the position we are in on that subject." (R. 1391.)

"THE COURT: Counsel, I want to ask this. I have been giving the matter considerable thought on the possible fact question I see in the case—not covered by any one of these three—and that is,—and I make this statement in view of the argument of the State's attorney yesterday afternoon, that whether or not this area in controversy here is in substantially the same condition it was at the time of de la Fuente's survey—

MR. WINN: We say, if Your Honor please, that that inquiry from the Jury would be of no consequence to you because whether it is or whether it is not, that is taking the evidence in its most favorable light to the defendants, *admitting every word that they have said here,* the uncontroverted evidence is that water still runs over it, and that when water runs over it now, it is still submerged land, and, therefore, it is of no consequence at all as to whether it is in the same condition it was at the time of Fuente as it is now for the reason that it is still submerged land. It wouldn't make any difference if it was five feet high or nine

feet high or if Pike's Peak was out there, as I told you before. If the waters of the sea still roll over it, under the Civil Law it is still a part of the bed of the sea, and that is the sole determining criterion. Therefore, I don't think there is any fact issue about that, or any issue to be submitted to the Jury about it." (R. 1386-1387.)

"THE COURT: Counsel for the State.

MR. RICE: Your Honor, answering your last inquiry first, we did not intend to make a fact issue on the fact that the condition was the same as Mr. de la Fuente found it. The State does have some evidence on that point which we had intended to come in with on rebuttal, and make just such an issue, but in view of the way that the Plaintiffs put on their accretion, the fact that they—all of their accretion either comes from the bed of the sea, or over from Padre Island, and not from the mainland out, we didn't see any use in taking the Court's time in going into the identity of conditions." (R. 1387.)

Article 5251, REVISED CIVIL STATUTES OF TEXAS:

"The Commissioner shall superintend, control and direct the official conduct of all subordinate officers of the General Land Office, and execute and perform all acts and things touching or respecting the public land of this State or rights of individuals in relation thereto, as may be required by law, and make and enforce suitable rules consistent therewith. He shall give information to the Governor and Legislature concerning the public lands, or the General Land Office, when required."